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Piper Rudnick

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

1200 Nineteenth Street, N W
Washington, D C 20036-2412
main 202 861 3900 *fax* 202 223 2085

ORIGINAL

PAUL W JAMIESON
paul jamieson@piperrudnick com
direct 202 861 6917 *fax* 202 689 7520

August 7, 2003

HAND DELIVERY

Ms. Marlene H Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re. *Ex Parte* Notification
CG Docket No. 02-278

Dear Ms Dortch.

On August 6, 2003, Steven Manzo, Vice President, Government Affairs, Steven Emmert, Director, Government and Industry Affairs, for Reed Elsevier, Inc. ("Reed Elsevier") and its counsel, Ronald Plesser and I, both of Piper Rudnick, met with Margaret Egler, Deputy Bureau Chief for Policy of the FCC's Consumer and Governmental Affairs Bureau ("CGB") and CGB attorney advisors Richard Smith and Erica McMahon. At this meeting, we discussed Reed Elsevier's opposition to the FCC's decision to reverse its conclusion that an existing business relationship establishes the requisite consent necessary under the Telephone Consumer Protection Act to send an unsolicited fax advertisement. We left the attached handout, which summarizes the points that Reed Elsevier made at the meeting.

Please associate this notice and the accompanying materials with the record in this proceeding.

Sincerely,

Paul W. Jamieson
Counsels for Reed Elsevier, Inc.

PWJ/eo
Enclosure

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Piper Rudnick

cc: Margaret Egler, Esq.
Erica McMahon, Esq.
Richard Smith, Esq.
Ron Plesser, Esq

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THE FCC REVERSAL REQUIRING COMPANIES TO OBTAIN WRITTEN CONSENT PRIOR TO SENDING EXISTING CUSTOMERS FAX ADVERTISEMENTS IS UNWARRANTED AND WILL IMPOSE SEVERE HARDSHIPS ON BUSINESSES

The FCC has reversed its prior determination that an established business relationship ("EBR") is sufficient to establish the consent necessary for a company to send fax advertisements (¶¶ 187 et seq. of FCC Order 03-153). Upon the effective date of the rule changes, companies will have to obtain a signed, written statement, along with the fax number, that the recipient agrees to receive faxes. This change will impose extraordinary burdens on businesses who rely on fax communications as the primary mechanism to communicate offers and renewals to existing customers

The Record Does Not Support Ending the EBR as Consent for B-to-B Faxes

In the TCPA Order, the FCC justified its decision to no longer view an EBR as providing the consent needed in part because of comments received from consumer groups that unsolicited fax advertisements impose costs on consumers, who must pay for fax paper and toner. However, comments from businesses nearly universally supported continuing the EBR as consent for business-to-business faxes.

Further, some products marketed by fax, such as trade journals, are provided free to those who respond to a fax advertisement. Often, these publications are paid for by advertisers, and the readers get a useful reference related to their business. The FCC's reversal ends up with the perverse result that substantial benefits to businesses are curtailed in the interest of preventing the imposition of negligible costs.

Nowhere in the Order does the FCC explain that its decision to reverse itself on the EBR as consent for faxes was the result of changed circumstances. As the change in the interpretation of what is necessary for "prior express invitation" impedes commercial speech, the FCC bears a substantial burden under US West v. FCC, 182 F.3d 1224 (10th Cir. 1999) to build a record demonstrating that obvious alternatives that are less burdensome on businesses are insufficient to protect consumer privacy.

The Rule Change Severely Hampers A Range of Industries that Rely on Fax Communications.

Businesses in varied industries rely on fax communications with their customers as a method to communicate about a range of business practices. The high acceptance rates as a result of the fax communication in many industries, such as trade shows and periodical subscription renewals, demonstrate that faxed advertisements for offers between a business and its customers are welcomed, even if not specifically solicited. The elimination of the EBR impedes the use of a valuable tool for businesses to quickly communicate offers and other information to their customers.

A Fax is Often the Most Efficient Method of Communicating with Customers

- An e-mail message will often be lost in the midst of business e-mail, personal e-mail and spam in a customer's in box. Faxes, on the other hand, are often handled directly and personally delivered to the recipient's desk.

- Direct mail takes too long, is often timed improperly and is often disregarded. In the case of subscriptions, many companies have to send out by direct mail renewal offers well before the customer is thinking about expiration and renewal. As a consequence, direct mail subscription renewal notices are routinely ignored, even when the customer wants a renewal. In addition, mailing costs are 500 to 600 percent higher than fax costs for the same materials.

- Faxes are timely, much more likely to be reviewed, are an inexpensive way for many smaller businesses to advertise and generate generally higher acceptance rates than other forms of communication.

The Rule Change is Inconsistent with the FCC's Regulation of Telemarketing Calls

The FCC's amended rules permit telephone calls to persons on the national do-not-call list where there is an established business relationship between the caller and the called party. This is so even though the FCC and the FTC found that some telemarketing calls to residential phone numbers impinge on consumer privacy. However, in the fax context, where an established business relationship exists and the recipient has not communicated any desire not to receive unsolicited faxes, the FCC is not permitting companies to contact their customers in a business context without prior express, written consent. The FCC's opposite conclusions on these two situations are inconsistent and unmatched to the privacy interests they are designed to address.

At the Very Least, Businesses Need More Time to Comply

If the Commission does not change its rule, as we hope it does, it should at least give companies more time to comply. The FCC's deadline for compliance with the new rule is way too short for the businesses whose operations have operated for 12 years (since the 1992 Order) around sending faxes to customers where there is an EBR. Particularly to accommodate businesses that send out solicitations infrequently (such as an organizer of an annual trade show), a several month implementation time frame is appropriate. A delay in implementation date would also be consistent with the Commission's decision to delay the effective date of the Do-Not-Call List (October 1, 2003), abandoned call rules (October 1, 2003) and caller ID Rules (January 29, 2004). The rationale for a phased in time period is at least as compelling with respect to the Commission's reversal of its conclusion that an EBR is sufficient consent for faxed advertisements.